

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

FILED

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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY *aw*

MILAN LUNA,

Plaintiff,

-vs-

Case No. A-11-CA-985-SS

**JUSTIN BERRY; TRACY ZIMMERMAN; ART
ACEVEDO, as Chief of Police; and THE CITY OF
AUSTIN,**

Defendants.

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically the defendants' Motion for Sanctions filed January 31, 2013 [#43], and thereafter, enters the following:

This lawsuit was filed on November 18, 2011. On March 19, 2012, the Court entered the parties' agreed scheduling order, which, *inter alia*, required plaintiff Luna to disclose the designation of all potential witnesses, testifying experts, and proposed exhibits by October 26, 2012, setting a discovery deadline and a docket call for May 31, 2013, with trial in the month of June 2013. Difficulties developed between the plaintiff Luna and counsel Bobby Taylor, which resulted in Mr. Taylor's Motion to Withdraw as Counsel and this Court's order of October 25, 2012 allowing him to so withdraw. The order of October 25, 2012 reminded the plaintiff Milan Luna that the deadline for disclosing the plaintiff's potential witnesses, testifying experts, and proposed exhibits was extended to November 26, 2012, but that all other dates set forth in the scheduling order would remain in full force and effect. On November 26, 2012, Jeffrey S. Kelly entered his appearance on

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behalf of the plaintiff Milan Luna. On January 28, 2013, the Court entered its order setting the pretrial conference in this case for February 7, 2013. On January 31, 2013, the defendants filed a motion for sanctions representing there had been no disclosure of witnesses or exhibits, experts or the experts opinions by November 28, 2012, but subsequent to that date Mr. Edwards had designated two out-of-state experts with no expert opinion reports and made nonsensical responses to discovery issued months earlier by the defendants' counsel. Further it was alleged Mr. Kelly had failed to supplement or respond to defendants' second discovery requests served December 12, 2012, and had not cooperated to make the plaintiff available for deposition after repeated requests.

On February 7, 2013 at the allotted time, counsel for the defendants appeared, but Mr. Kelly failed to appear. Mr. Kelly was finally located by telephone and represented he had the date and/or time wrong on his calendar. Mr. Kelly indicated the persons he had named as experts were not really going to be experts in this case and he intended to obtain experts in the near future. In short, Mr. Kelly had absolutely no excuse for the failure to comply with the orders of this Court, the agreed scheduling order or the Federal Rules of Civil Procedure as well as not attending the Court's pretrial status conference. Notwithstanding, the Court again extended the opportunity for the plaintiff Luna until February 14, 2013 to respond to the defendants' motion for sanctions. Obviously, Ms. Luna and Mr. Kelly declined to file any response.

Thus, the circumstances of this case are Milan Luna would proceed to trial without any witnesses, including experts, has wholly failed to participate in discovery in this case, declining to respond to discovery requests, declining to appear for deposition, not cooperating with either of her two counsel of record, and not complying with multiple orders of this Court.

IT IS THEREFORE ORDERED the above-styled and numbered cause is DISMISSED for the failure of Milan Luna to diligently and timely prosecute this lawsuit against the defendants.

IT IS FURTHER ORDERED that the defendants' Motion for Sanctions is GRANTED, and the Court will allow and consider affidavits filed within fifteen (15) days of this order setting out the expenses of defending the Austin Police Officers, the Chief of Police, and the City of Austin as well as all attorney's fees expended in this lawsuit. A subsequent order of sanctions will be in the final judgment in this case.

SIGNED this the 11th day of March 2013.


UNITED STATES DISTRICT JUDGE